UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – DETROIT

IN RE: FCA US LLC MONOSTABLE ELECTRONIC GEARSHIFT LITIGATION	THIS DOCUMENT APPLIES TO ALL CASES
MDL No. 2744	Hon. David M. Lawson Mag. Judge David R. Grand

FCA US LLC'S RULE 12(b)(6) MOTION TO DISMISS

Defendant FCA US LLC, pursuant to Federal Rule of Civil Procedure 12(b)(6), moves this Court to dismiss the Consolidated Master Class Action Complaint its entirety because all Plaintiffs fail to state a claim upon which relief may be granted. In support its motion, FCA US states as follows:

1. Plaintiffs fail to state a claim for common law and statutory fraud that is plausible on its face when the gravamen of their claims is ***not*** that their vehicles malfunction, but only that the vehicles lack a certain safety feature which Plaintiffs did not bargain for and never believed that they had.

2. Plaintiffs' common law and statutory fraud claims do not satisfy the requirements of Federal Rule of Civil Procedure 9(b) because they do not adequately plead the who, what, when, and where of their allegations.

3. Plaintiffs' common law and statutory fraud claims also fail to state a claim because the affirmative misrepresentations identified are all non-actionable

puffery, and the allegations set forth do not support reliance, causation, pre-sale knowledge, or a duty to disclose.

4. Plaintiffs' statutory fraud claims pleaded under the laws of California, Georgia, Massachusetts, Texas, and Wyoming fail to state a claim because Plaintiffs did not serve a pre-suit demand letter which complies with the mandates set forth in each state's statute.

5. The economic loss doctrine bars the common law and/or statutory fraud claims pleaded under the laws of Colorado, Florida, Maryland, Michigan, Minnesota, New Jersey, North Carolina, Pennsylvania, and Utah because Plaintiffs seek damages only for lost product value and inconvenience.

6. The Ohio, California, Texas, Missouri, Arizona, North Carolina, Massachusetts, Georgia, Minnesota, Iowa, Louisiana, Colorado, Nebraska, New York, Washington, Illinois, and New Jersey Plaintiffs fail to state a plausible claim for relief because they do not plead facts necessary to meet specific statutory and common law fraud requirements in these states.

7. Plaintiffs' claims for unjust enrichment fail to state a claim for relief because the Consolidated Master Class Action Complaint is devoid of any factual allegations supporting the notion that any benefit was conferred on FCA US by Plaintiffs' vehicle purchases, an adequate remedy at law exists, Plaintiffs are indirect purchasers, and/or unjust enrichment is not a recognized claim in the state

for which they plead the claim.

8. Plaintiffs fail to state a claim for breach of express warranty based on a promise to repair "items" on their vehicles because their claims are not premised on any defect in, or malfunction in, an "item" actually installed on their vehicles, but, rather, on the absence of a safety feature, and the warranty does not encompass "design" defects.

9. Plaintiffs' express warranty claims are also barred due to their failure to give the statutorily required pre-suit notice.

10. The Illinois Plaintiffs' breach of express warranty claim brought under the Illinois UCC fails to state a claim because it is based on a fix and repair warranty, and the Illinois Supreme Court has held that such a warranty is not actionable as a UCC warranty.

11. Plaintiffs fail to state a claim for breach of any implied warranty because they do not plead adequate facts demonstrating that their vehicles are unfit for their ordinary purpose of transportation when there is no allegation that they have ever stopped driving their vehicles, and they admit that the allegedly defective shifter in their vehicles operates exactly as designed, has never malfunctioned, puts their vehicle into park gear when that gear is engaged, and poses a safety risk only if a driver engages in product misuse and fails to put the shifter into park.

12. Plaintiffs also fail to state a claim for breach of implied warranty because the alleged defect in their vehicles never manifested during the period of that warranty or at all, they are not in privity with FCA US, and they failed to provide the requisite pre-suit notice of a breach as required by the applicable state laws.

13. The Louisiana Plaintiff's claim for breach of implied warranty under Louisiana law is barred and or preempted because no facts support the notion that the vehicles at issue are useless or have diminished usefulness, and the Louisiana Product Liability Act preempts certain specified implied warranty claims like that pleaded here.

14. Plaintiffs fail to state a cognizable claim for violation of the Magnuson-Moss Warranty Act because all of their state-law express and implied warranty claims fail.

15. The statutes of limitations in Arizona, Louisiana, Massachusetts, New Jersey, Oklahoma, Oregon, Pennsylvania, and Utah bar certain Plaintiffs' claims, and the facts pleaded are legally insufficient to invoke tolling and estoppel principles.

16. The Colorado Plaintiffs do not state a legally viable strict liability claim under Colorado law because the Colorado Products Liability Act does not create a substantive cause of action, and strict liability claims are not recognized in

Colorado where, as here, only economic damages are at stake.

17. Plaintiffs have not pleaded any legally viable claim when all of their causes of action require an injury/damages, and Plaintiffs admit that they have already been provided, free-of-charge, the very safety feature that was missing from their vehicles and which they claim was necessary to make their vehicles non-defective.

18. This Motion is made following a conference with counsel pursuant to L.R. 7-1(a), which took place on February 10, 2017, in which counsel for FCA US explained the nature of this motion and its legal basis, but did not obtain concurrence in the relief sought.

19. In further support of its Motion, FCA US adopts and incorporates herein by reference its Brief in Support of its Rule 12(b)(6) Motion.

FOR RELIEF Defendant FCA US LLC respectfully requests that this Court dismiss the Consolidated Master Class Action Complaint in its entirety with prejudice, and grant it all other appropriate relief.

Respectfully submitted,

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Dated: February 15, 2017.

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MDL No. 2744

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Hon. David M. Lawson
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FCA US LLC'S BRIEF IN SUPPORT OF ITS RULE 12(b)(6) MOTION TO DISMISS

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ISSUES PRESENTED

1. Whether Plaintiffs' common law and statutory fraud claims can survive when the gravamen of Plaintiffs' claim is ***not*** that their vehicle malfunctions, but only that it lacks a certain safety feature which they did not bargain for and never believed that they had?

2. Whether Plaintiffs' common law and statutory fraud claims are adequately pleaded when the who, what, when, and where allegations required by Rule 9(b) are missing, the affirmative misrepresentations identified are all non-actionable puffery, and the allegations set forth do not support reliance, causation, pre-sale knowledge, or a duty to disclose?

3. Whether Plaintiffs' statutory fraud claims pleaded under the laws of California, Georgia, Massachusetts, Texas, and Wyoming fail because Plaintiffs did not serve a pre-suit demand letter which complies with the mandates set forth in each state's statute?

4. Whether the economic loss doctrine bars the common law and/or statutory fraud claims pleaded under the laws of Colorado, Florida, Maryland, Michigan, Minnesota, New Jersey, North Carolina, Pennsylvania, and Utah when that doctrine applies to fraud-based claims under the laws of these states, and Plaintiffs seek damages only for lost product value and inconvenience?

5. Whether state-specific laws in Ohio, California, Texas, Missouri, Arizona, North Carolina, Massachusetts, Georgia, Minnesota, Iowa, Louisiana, Colorado, Nebraska, New York, Washington, Illinois, and New Jersey bar the common law and/or statutory fraud claims pleaded on behalf of residents/purchasers in these states?

6. Whether Plaintiffs' claims for unjust enrichment are viable when no allegations support the notion that any benefit was conferred on FCA US by Plaintiffs' vehicle purchases, an adequate remedy at law exists, Plaintiffs are indirect purchasers, and/or unjust enrichment is not a recognized claim?

7. Whether Plaintiffs have stated a claim for breach of express warranty based on a promise to repair "items" on their vehicles when their claims are not premised on any defect in, or malfunction in, an "item" actually installed on their vehicles, but, rather, on the absence of a safety feature?

8. Whether Plaintiffs' express warranty claims are barred due to their failure to give the statutorily required pre-suit notice?

9. Whether Plaintiffs' breach of express warranty claim brought under the Illinois UCC can survive when it is based on a fix and repair warranty, and the Illinois Supreme Court has held that such a warranty is not actionable as a UCC warranty?

10. Whether Plaintiffs have pleaded adequate facts demonstrating that their vehicles are unfit for their ordinary purpose of transportation when there is no allegation that they have ever stopped driving their vehicles, and they admit that the allegedly defective shifter in their vehicles operates exactly as designed, has never malfunctioned, puts their vehicle into park gear when that gear is engaged, and poses a safety risk only if a driver engages in product misuse and fails to put the shifter into park?

11. Whether Plaintiffs have stated a claim for breach of implied warranty when the alleged defect in their vehicles never manifested during the period of that warranty or at all, they are not in privity with FCA US, and they failed to provide the requisite pre-suit notice of a breach as required by the applicable laws?

12. Whether the claim for breach of implied warranty under Louisiana law is barred and or preempted when no facts support the notion that the vehicles at issue are useless or have diminished usefulness, and the Louisiana Product Liability Act preempts certain specified implied warranty claims like those pleaded here?

13. Whether Plaintiffs have stated a cognizable claim for violation of the Magnuson-Moss Warranty Act when all of their state-law express and implied warranty claims fail?

14. Whether the statutes of limitations in Arizona, Louisiana, Massachusetts, New Jersey, Oklahoma, Oregon, Pennsylvania, and Utah bar certain Plaintiffs' claims because the facts pleaded are legally insufficient to invoke tolling and estoppel principles?

15. Whether a legally viable strict liability claim is pleaded under Colorado law when the Colorado Products Liability Act does not create a substantive

cause of action and strict liability claims are not recognized in Colorado where, as here, only economic damages are at stake?

16. Whether Plaintiffs have pleaded any legally viable claim when all of their causes of action require an injury/damages, and Plaintiffs admit that they have already been provided, free-of-charge, the very safety feature that was missing from their vehicles and which they claim was necessary to make their vehicles non-defective?

CONTROLLING AUTHORITY

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)

FCA US LLC's Motion to Dismiss implicates the "controlling and appropriate authorities" of multiple Circuits and twenty-seven states. Accordingly, FCA US only lists cited Supreme Court authorities on this table, and submits herewith, as Exhibit A, an appendix of "controlling and appropriate" state law on the legal issues raised herein for each state included in the Consolidated Master Class Action Complaint. The cases cited in this Brief are not repeated in the appendix.

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. RELEVANT FACTS 2

- **A.** The Plaintiffs. 2
- **B.** The Allegations Of "Defect." 6
- **C.** The NHTSA Investigation And FCA US's Response. 7
- **D.** FCA US's Alleged Failure To Disclose And "Knowledge." 7
- **E.** The Classes, Claims Pled, And Relief Sought. 8

III. ARGUMENT 9

- **A.** The Applicable Legal Standard. 9
- **B.** Plaintiffs' Fraud-Based Claims Fail. 10
  1. Failure to Comply With Rule 9(b). 11
  2. No Facts Supporting Reliance Or Causation. 13
  3. Additional Flaws In Plaintiffs' Omission Claims. 15
  4. No Facts Supporting Any Affirmative Misrepresentations. 22
  5. Failure To Provide The Requisite Pre-Suit Notice. 23
  6. The Bar Of The Economic Loss Doctrine. 25
  7. State-Specific Bases For Dismissing Fraud Claims. 26
- **C.** The Unjust Enrichment Counts Are Legally Deficient. 32
  1. No Facts Pleaded Supporting A Conferred Benefit. 32
  2. An Adequate Remedy At Law Precludes Unjust Enrichment. 33
  3. As Indirect Purchasers Plaintiffs Have No Unjust Enrichment Claim. 34
  4. Unjust Enrichment Is Not A Claim In Texas. 34

D. No Viable Express Warranty Claim Exists For The "Defect" At Issue. 34

1. No Allegations Of An Applicable Warranty. 34

2. Failure To Provide Required Pre-Suit Notice. 37

3. The Express Warranty Is Not Actionable Under The Illinois UCC. 38

E. The Claims For Breach Of Implied Warranty Are Fatally Flawed. 39

1. The Vehicles Are Fit For Their Ordinary Purpose. 39

2. No Manifestation Of Any Defect While Implied Warranty In Effect. 41

3. The Implied Warranty Claims Barred Due To A Lack Of Privity. 41

4. Lack Of Manifestation Requires Dismissal. 42

5. Claims Barred Due To A Lack Of Pre-Suit Notice. 43

6. The Louisiana Implied Warranty Claim Is Precluded. 44

F. The Legal Insufficiency Of The Magnuson-Moss Warranty Act Claim. 45

G. Additional Plaintiff-Specific Grounds for Dismissal. 45

1. Claims Barred By Statutes Of Limitation. 45

2. No Legally Viable Products Liability Claim Under Colorado Law. 49

H. Lack Of Any Legally Cognizable Injury. 50

IV. CONCLUSION 50

TABLE OF AUTHORITIES

Cases **Page(s)**

A & M Supply Co. v. Microsoft Corp.,
2008 WL 540883 (Mich. Ct. App. Feb. 28, 2008) 33

Abraham v. Volkswagen of Am., Inc.,
795 F.2d 238 (2d Cir. 1986) 38

Am. Suzuki Motor Co. v. Superior Court,
44 Cal. Rptr. 2d 526 (Cal. Ct. App. 1995)....42, 43

Ashcroft v. Iqbal,
556 U.S. 662 (2009)....9

Bardin v. DaimlerChrysler Corp.,
136 Cal. App. 4th 1255 (2006) 15

Bd. of Educ. v. Deitrick,
18 S.E.2d 704 (N.C. 1942)....29

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)....9

Bladen v. C.B. Fleet Holding Co.,
487 F. Supp. 2d 759 (W.D. La. 2007) 30

Boiardi v. Freestate,
2013 WL 5410131 (D. Md. Sept. 25, 2013)....19

Boris v. Wal-Mart Stores, Inc.,
35 F. Supp. 3d 1163 (C.D. Cal. 2014) 13

Breeden v. Richmond Cmty. Coll.,
171 F.R.D. 189 (M.D.N.C. 1997)....21

Briehl v. Gen. Motors Corp.,
172 F.3d 623 (8th Cir. 1999) 43

Bussian v. DaimlerChrysler Corp.,
411 F. Supp. 2d 614 (M.D.N.C. 2006) 25

Cali v. Chrysler Grp. LLC,
2011 WL 383952 (S.D.N.Y. Jan. 18, 2011), *aff'd*, 426 F. App'x 38 (2d Cir. 2011) 36

Canady v. Ortho-McNeil Pharm., Inc.,
2014 WL 4930675 (N.D. Ohio Oct. 1, 2014) 44

Carter v. Brighton Ford, Inc.,
251 P.3d 1179 (Colo. Ct. App. 2010) 49

City of Tulsa v. Bank of Okla., N.A.,
280 P.3d 314 (Okla. 2011) 47

Clemens v. DaimlerChrysler Corp.,
534 F.3d 1017 (9th Cir. 2008) 35

Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.,
508 F.3d 327 (6th Cir. 2007) 35

Cooper v. Samsung Elecs. Am., Inc.,
374 F. App'x 250 (3d Cir. 2010) 45

Crown Castle USA Inc. v. Fred A. Nudd Corp.,
2008 WL 163685 (W.D.N.Y. Jan. 16, 2008), *modified on reconsideration*, 2008 WL 3841298 (W.D.N.Y. Aug. 13, 2008) 18

Davidson v. Kimberly-Clark Corp.,
76 F. Supp. 3d 964 (N.D. Cal. 2014) 18

Donohue v. Apple, Inc.,
871 F. Supp. 2d 913 (N.D. Cal. 2012) 44

Eisen v. Porsche Cars N. Am., Inc.,
2012 WL 841019 (C.D. Cal. Feb. 22, 2012) 11

Elvig v. Nintendo of Am., Inc.,
2010 WL 3803814 (D. Colo. Sept. 23, 2010) 49

Entrialgo v. Twin City Dodge, Inc.,
333 N.E.2d 202 (Mass. 1975) 23

Gale v Int'l. Bus. Mach. Corp.,
781 N.Y.S.2d 45 (2004) 22

Garcia v. Chrysler Grp. LLC,
127 F. Supp. 3d 212 (S.D.N.Y. 2015) 37

Gason v. Dow Corning Corp.,
170 F. Supp. 3d 989 (E.D. Mich. 2016), *aff'd*, 2017 WL 65564
(6th Cir. Jan. 6, 2017) 18

Gedalia v. Whole Foods Mkt. Servs., Inc.,
53 F. Supp. 3d 943 (S.D. Tex. 2014)....................34

Glass v. BMW of N. Am., LLC,
2011 WL 6887721 (D.N.J. Dec. 29, 2011)....................23

Glauberzon v. Pella Corp.,
2011 WL 1337509 (D.N.J. April 7, 2011)....................13

Gorman v. Am. Honda Motor Co., Inc.,
839 N.W.2d 223 (Mich. Ct. App. 2013)....................37

Gotthelf v. Toyota Motor Sales, U.S.A., Inc.,
525 F. App'x 94 (3d Cir. 2013) 16

Gray v. Toyota Motor Sales, U.S.A.,
2012 WL 313703 (C.D. Cal. Jan. 23, 2012) 21

Gross v. Stryker Corp.,
858 F. Supp. 2d 466 (W.D. Pa. 2012)....................34

Haag v. Hyundai Motor Am.,
969 F. Supp. 2d 313 (W.D.N.Y. 2013)....................40

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,
719 P.2d 531 (Wash. 1986) (en banc) 14

Harnden v. Ford Motor Co.,
408 F. Supp. 2d 315 (E.D. Mich. 2005) 42

Hoffman v. A. B. Chance Co.,
339 F. Supp. 1385 (M.D. Pa. 1972)....................23

Hollybrook Cottonseed Processing, LLC v. Carver, Inc.,
2010 WL 2195685 (W.D. La. May 28, 2010) 45

Horibin v. Providence & Worcester R.R. Co.,
352 F. Supp. 2d 116 (D. Mass. 2005)....................19

Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc.,
532 N.W.2d 541 (Mich. Ct. App. 1995)....................25

Javitt v. Cunningham Contracting, Inc.,
2016 WL 4493367 (Md. Ct. Spec. App. Aug. 26, 2016)....................17

Johnson v. CHL Enters.,
115 F. Supp. 2d 723 (W.D. La. 2000)....................44

Kearns v. Ford Motor Co.,
567 F.3d 1120 (9th Cir. 2009)....................11

Kelly v. Georgia-Pacific LLC,
671 F. Supp. 2d 785 (E.D.N.C. 2009)....................14, 27

Kuns v. Ford Motor Co.,
543 F. App'x 572 (6th Cir. 2013)....................45

Lassen v. Nissan N. Am., Inc.,
2016 WL 5868101 (N.D. Cal. Sept. 30, 2016)....................10, 16

In re Liberty Mut. Fire Ins. Co.,
2010 WL 1655492 (Tex. Ct. App. Apr. 27, 2010)....................25

Litman, Asche & Gioiella, LLP v. Chubb Custom Ins. Co.,
373 F. Supp. 2d 314 (S.D.N.Y. 2005)....................33

Livingston v. Trustgard Ins.,
988 F. Supp. 2d 873 (N.D. Ill. 2013)....................11

Lynx, Inc. v. Ordnance Prods., Inc.,
327 A.2d 502 (Md. Ct. App. 1974)....................44

Martinez v. Weyerhaeuser Mortg. Co.,
959 F. Supp. 1511 (S.D. Fla. 1996)....................33

McCabe v. Daimler AG,
948 F. Supp. 2d 1347 (N.D. Ga. 2013)....................37, 38

McCall v. Monro Muffler Brake Inc.,
2013 WL 3418089 (E.D. Mo. July 8, 2013) 22

McCalley v. Samsung Elecs. Am. Inc.,
2008 WL 878402 (D.N.J. Mar. 31, 2008) 41

McDaniel v. Denver Lending Grp., Inc.,
2009 WL 1873581 (D. Colo. June 30, 2009) 16

McGuffin v. Baumhaft,
2007 WL 956907 (E.D. Mich. Mar. 28, 2007) 11

McKinney v. Bayer Corp.,
744 F. Supp. 2d 733 (N.D. Ohio 2010) 26

McQueen v. BMW of N. Am., LLC,
2014 WL 656619 (D.N.J. Feb. 20, 2014) 17

Monticello v. Winnebago Indus., Inc.,
369 F. Supp. 2d 1350 (N.D. Ga. 2005) 37

Moore v. Coachmen Indus., Inc.,
499 S.E.2d 772 (N.C. Ct. App. 1998) 41

Mydlach v. DaimlerChrysler Corp.,
875 N.E.2d 1047 (Ill. 2007) 38, 39

Nelson v. Nissan N. Am., Inc.,
2014 WL 7331075 (D.N.J. Dec. 19, 2014) 36

Newberry v. Silverman,
789 F.3d 636 (6th Cir. 2015) 11

Oliver v. Funai Corp., Inc.,
2015 WL 3938633 (D.N.J. June 25, 2015) 34

Omni USA, Inc. v. Parker-Hannifin Corp.,
798 F. Supp. 2d 831 (S.D. Tex. 2011) 28

People v. Superior Court,
478 P.2d 449 (Cal. 1970) 19

Perkins v. DaimlerChrysler Corp.,
890 A.2d 997 (N.J. Super. Ct. App. Div. 2006) 29, 32, 33

Plagens v. Nat'l RV Holdings,
328 F. Supp. 2d 1068 (D. Ariz. 2004) 42

Ruffin v. Shaw Indus., Inc.,
149 F.3d 294 (4th Cir. 1998) 34

Sanchez v. Ford Motor Co.,
2014 WL 2218278 (D. Colo. May 29, 2014) 22

Sardinas v. Geithner,
2010 WL 3025601 (D. Nev. July 30, 2010) 14

Sassafras Enters., Inc. v. Roshco, Inc.,
915 F. Supp. 1 (N.D. Ill. 1996)..32

Sater v. Chrysler Grp., LLC,
2016 WL 7377126 (C.D. Cal. Oct. 25, 2016) 50

Soto v. CarMax Auto Superstores, Inc.,
611 S.E.2d 108 (Ga. Ct. App. 2005)..40

Spring v. Geriatric Auth. of Holyoke,
475 N.E.2d 727 (Mass. 1985)..24, 25

Stark v. Adv. Magnetics, Inc.,
736 N.E. 2d 434 (Mass. Ct. App. 2000) 49

Storey v. Attends Healthcare Prods., Inc.,
2016 WL 3125210 (E.D. Mich. June 3, 2016) 12

Szymczak v. Nissan N. Am., Inc.,
2011 WL 7095432 (S.D.N.Y. Dec. 16, 2011) 22

Tae Hee Lee v. Toyota Motor Sales, U.S.A., Inc.,
992 F. Supp. 2d 962 (C.D. Cal. 2014) 36

Talbott v. C.R. Bard, Inc.,
865 F. Supp. 37 (D. Mass. 1994)...29

Taragan v. Nissan N. Am, Inc.,
2013 WL 3157918 (N.D. Cal. June 20, 2013)....20, 21, 43, 50

Thunander v. Uponor, Inc.,
887 F. Supp. 2d 850 (D. Minn. 2012)....18

Torres-Hernandez v. CVT Prepaid Sols., Inc.,
2008 WL 5381227 (D.N.J. Dec. 17, 2008)....12, 13

Tri-State Cons. Ins. Co. v. LexisNexis Risk Sols. Inc.,
823 F. Supp. 2d 1306 (N.D. Ga. 2011)....30

Utah Local Gov't Tr. v. Wheeler Mach. Co.,
199 P.3d 949 (Utah 2008)....48

Veches v. Majewski,
2012 WL 2202979 (Minn. Ct. App. June 18, 2012)....31

Verb v. Motorola, Inc.,
672 N.E.2d 1287 (Ill. App. Ct. 1996)....50

Vess v. Ciba-Geigy Corp. USA,
317 F.3d 1097 (9th Cir. 2003)....11

Vitt v. Apple Comput., Inc.,
469 F. App'x 605 (9th Cir. 2012)....23

Waters v. Electrolux Home Prods., Inc.,
154 F. Supp. 3d 340 (N.D.W.V. 2015)....34

Wells Fargo Bank v. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund,
38 P.3d 12 (Ariz. 2002)....29

Werwinski v. Ford Motor Co.,
286 F.3d 661 (3d Cir. 2002)....25

Williams v. Janssen Pharms., Inc.,
2016 WL 6127526 (W.D. La. Oct. 20, 2016)....44

Wilson v. Hewlett-Packard Co.,
668 F.3d 1136 (9th Cir. 2012)....28

Wiseberg v. Toyota Motor Corp.,
2012 WL 1108542 (D.N.J. Mar. 30, 2012) 32

Woods v. Maytag Co.,
2010 WL 4314313 (E.D.N.Y. Nov. 2, 2010) 17

Yost v. Gen. Motors Corp.,
651 F. Supp. 656 (D.N.J. 1986)..40

Statutes

15 U.S.C. § 2301, *et seq.*...45

ARIZ. REV. STAT. § 12-541(5)...45

GA. CODE ANN. § 10-1-399(a) 30

820 ILL. COMP. STAT. 5/2-313...38

IOWA CODE § 714H.7 30

LA. CIV. CODE ANN. art. 2520...44

LA. CIV. CODE ANN. art. 2524...44

LA. CIV. CODE ANN. art. 2534...46

LA. STAT. ANN. § 51-1409(A)..30

LA. STAT. ANN. § 51:1409(E)..46

MASS. GEN. LAWS Ch. 93A § 1 *et seq.* 46

MASS. GEN. LAWS Ch. 93A § 9 23

MASS. GEN. LAWS Ch. 106 § 2-318 47

MASS. GEN. LAWS Ch. 260, § 2A 46, 47

MASS. GEN. LAWS Ch. 260, § 5A...46

MINN. STAT.§ 325.D.45 30

N.J. STAT. ANN. § 2A:14-2 47

OHIO REV. CODE ANN. § 1345.09(B) 26

OKLA. STAT. ANN. tit. 12, § 95(A)(3) 47

OR. REV. STAT. § 646.638 47

42 PA. CONS. STAT. § 5524(7) 48

UTAH CODE ANN. §13-11-19(8) 48

UTAH CODE ANN. § 78B-6-706 48

WYO. STAT. § 40-12-105(a) 17

WYO. STAT. § 40-12-109 23

Other Authorities

Rule 9(b) 11, 12, 13

Rule 12(b)(6) 9, 50

I. INTRODUCTION

Although the monostable shifter is electronic, it performs exactly like the traditional mechanical console-located shifters that have been found in vehicles for decades: you must move it backward from the "park" gear to achieve, in order, "reverse," "neutral," and "drive," and, after one of these gears is achieved you must move it forward to achieve "park." Just as with the old mechanical shifters, a driver utilizing a monostable shifter is alerted to the gear engaged by the "PRND" lights on the dashboard and at the console area. And, despite Plaintiffs' (false) allegations to the contrary, the monostable shifter does have a tactile feel as it is moved from one gear to the next, and this, too, acts to alert the driver to what changes in gear are being made.

The only difference between the console-based electronic monostable shifter at issue here, and a console-based traditional mechanical shifter that has been used for decades, is the physical shifter itself in a monostable vehicle returns to a center position after a gear change, while a mechanical shifter stays in the forward or backward spot where the driver moved it when a gear is selected.

Despite this, and the undeniable fact that every driver understands that before he leaves his car he must first place the shifter in any motor vehicle into the park position, Plaintiffs seek to impose massive liabilities on Defendant FCA US LLC based on the notion that monostable shifter vehicles are unsafe unless they are equipped with an "automatic park" feature that engages whenever a driver exists the vehicle without first engaging the park gear. ***Even under Plaintiffs' theory, however, the vehicles at issue are safe*** because, in accordance with an agreement made before this lawsuit was filed, FCA US has now provided a free "auto-park" system to all consumers owning a vehicle equipped with a monostable shifter.

For this, and a host of other reasons, the Consolidated Master Complaint ("CMC") fails to state any plausible claim to relief and should be dismissed.

II. RELEVANT FACTS

A. The Plaintiffs.

Plaintiffs own(ed) or lease(d) FCA US vehicles that operate with the use of a monostable shifter, which, as Plaintiffs admit, uses a push-button console shift lever that returns to its center position once the driver has selected his/her gear, while, at the same time, signifying to the driver the gear selection he has made through indicator lights displayed on both the dash and the shifter. *See* Docket No. 31 (Consolidated Master Class Action Complaint) ("CMC"), ¶ 193. Plaintiffs' state of residence, date of purchase/lease, and their type of vehicle are as follows:

Plaintiff	**State of Residence/ Purchase**	**Date of Purchase or Lease**	**Vehicle**	**CMC Cite**
Guy	Arizona	1/31/15 Purchase	New model year 2015 Jeep Grand Cherokee	¶ 31

Perkins	Arizona	10/8/14 Purchase	New model year 2014 Chrysler 300	¶ 33
Yacoub	Arizona	No date Purchase	New model year 2014 Chrysler 300	¶ 35
Goldsmith	California	8/15/15 Purchase	New model year 2015 Jeep Grand Cherokee	¶ 37
Nathan, Jr.	California	9/10/13 Purchase	New model year 2014 Jeep Grand Cherokee	¶ 39
Pietri	California	5/1/16 Purchase	New model year 2015 Jeep Grand Cherokee	¶ 41
Felker	Colorado	11/17/15 Purchase (now sold)	New model year 2015 Jeep Grand Cherokee	¶¶ 43, 44
Andollo	Florida	2015 Purchase	New model year 2015 Jeep Grand Cherokee	¶ 45
Willis	Georgia	No date Purchase	Used model year 2012-Dodge Charger	¶ 47
Havnen	Iowa	No date Purchase	New model year 2015 Jeep Grand Cherokee	¶ 49
McDonald	Illinois	7/8/13 Purchase	New model year 2014 Jeep Grand Cherokee	¶ 51
Wells	Illinois	4/30/15 Purchase	New 2015 Jeep Grand Cherokee	¶ 53
Stewart	Louisiana	5/13/15 Purchase	Used 2014 Jeep Grand Cherokee	¶ 55
Pollekoff	Maryland/ Virginia	No date Purchase	New 2015 Jeep Grand Cherokee	¶ 57
Schultz	Maryland	9/29/15 Purchase	Used 2014 Jeep Grand Cherokee	¶ 59
Hartt	Massachusetts	No date Purchase	2014 Jeep Grand Cherokee	¶ 61
D'Onofrio	Massachusetts	No date Purchase	2014 Chrysler 300S	¶ 63
Youngstrom, Jr.	Massachusetts	12/10/11 Purchase	New 2012 Dodge Charger	¶ 65
Machtley	Massachusetts	12/20/14 Purchase	New 2015 Jeep Grand Cherokee	¶ 67

Scott	Michigan	4/30/13 Purchase	New 2014 Jeep Grand Cherokee	¶ 69
Berken	Minnesota	No date Purchase	Used 2014 Jeep Grand Cherokee	¶ 71
Brooks	Missouri	5/28/16 Purchase	Used 2015 Jeep Grand Cherokee	¶ 73
Walker	Nebraska	No date Lease (ended)	2014 Dodge Charger	¶ 78
Marrero Bernal	Nevada	5/30/15 Purchase	New 2015 Jeep Grand Cherokee	¶ 80
Colrick	New Jersey	8/27/13 Purchase	New 2014 Jeep Grand Cherokee	¶ 82
Lynd	New York	11/30/14 Lease	New 2015 Jeep Grand Cherokee	¶ 84
Mack	New York	No date Purchase	2015 Jeep Grand Cherokee	¶ 92
Cruz	New York	No date Purchase	2014 Jeep Grand Cherokee	¶ 96
Gunnells	North Carolina	July 2015 Purchase	Used 2015 Jeep Grand Cherokee	¶ 100
Sheppard	North Carolina	No date Purchase	2015 Jeep Grand Cherokee	¶ 102
Danielle & Joby Hackett	Ohio	No date Purchase	New 2015 Jeep Grand Cherokee	¶ 104
Clark	Oklahoma	9/13/14 Purchase	New 2014 Jeep Grand Cherokee	¶ 106
Fisher	Oregon	12/9/14 Purchase	New 2015 Jeep Grand Cherokee	¶ 108
Weber	Pennsylvania	9/9/13 Purchase	New 2014 Jeep Grand Cherokee	¶ 110
Vosburgh	Pennsylvania	No date Purchase	New 2014 Jeep Grand Cherokee	¶ 112
John & Mary Metzger	Pennsylvania	4/7/14 Purchase	Used 2014 Jeep Grand Cherokee	¶ 114
Craig	Texas	No date Purchase	2014 Jeep Grand Cherokee	¶ 116
Foreman	Texas	No date Purchase	New 2014 Jeep Grand Cherokee	¶ 118

Dial	Texas	No date Purchase	New 2014 Jeep Grand Cherokee	¶ 120
Gillipsie	Texas	No date Purchase	New 2015 Jeep Grand Cherokee	¶ 122
Hyatt IV	Texas	Dec. 2014 Purchase	New 2014 Jeep Grand Cherokee	¶ 124
Phelps	Texas	4/26/16 Purchase	Used 2014 Jeep Grand Cherokee	¶ 126
Waggoner	Texas	No date Purchase	2014 Chrysler 300	¶ 128
Marble	Utah	1/7/14 Purchase	Used 2014 Jeep Grand Cherokee	¶ 130
Stedman	Washington	3/8/15 Purchase	New 2015 Jeep Grand Cherokee	¶ 134
Webster	Washington	April 2014 Purchase	New 2014 Jeep Grand Cherokee	¶ 136
Hughes	Wisconsin/ Minnesota	No date Purchase	Used 2014 Chrysler 300C	¶ 138
Magnuson	Wyoming	6/3/15 Purchase	New 2015 Jeep Grand Cherokee	¶ 140

Plaintiffs admit that they purchased/leased their vehicles from a third-party, and not FCA US. *Id.* ¶¶ 31-141. With six exceptions, each Plaintiff alleges that he reviewed or was exposed to unspecified "advertising messaging regarding safety and reliability" at an unspecified time. *Id.* ¶¶ 31-141. Plaintiffs Brooks, Mack, Sheppard, Cruz, and Weber do not allege that they ever reviewed any advertising message or representation from FCA US. *Id.* ¶¶ 73-77, 92-97, 102-03, 110-11. And, Plaintiff Lynd alleges only that he "believed that the vehicle was safe and reliable" based on unspecified "FCA[] representations." *Id.* at ¶ 85.

Plaintiffs Guy, Pietri, McDonald, Hartt, Youngstrom, Walker, Lynd, Sheppard, Weber, Vosburgh, Craig, Dial, Marble, and Hughes do not allege that they ever exited their vehicle without the shifter being in the park position, or that their vehicle ever made any movement when they mistakenly believed it was in park. *Id.* at ¶¶ 31-32, 41-42, 51-52, 61-62, 65-66, 78-79, 84-91, 102-03, 110-13, 116-17, 120-21, 130-31, 138-39. Plaintiffs Perkins, Nathan, Goldsmith, Andollo, Machtley, Scott, Metzger, Bernal, Colrick, Gunnels, the Hacketts, Fisher, Hyatt, Phelps, Stedman, Webster, Pollekoff, Schultz, D'Onofrio, Clark, Foreman, Waggoner, and Gillipsie allege that they experienced one or more "rollaway" incidents with their vehicles, but none allege that they placed the monostable shifter in their vehicles into park before it rolled away or that the rollaway incident(s) caused any damage or injury. *Id.* at ¶¶ 34, 36, 38, 40, 58, 60, 64, 107, 119, 123. Plaintiffs Yacoub, Berken, Brooks, Mack, Cruz, and Magnuson allege they had at least one rollaway incident, but only Mack and Cruz allege they placed their vehicle into park first, and none seek to recover any damages resulting from a rollaway incident. *Id.* at ¶¶ 36, 72, 74-75, 93-95, 97, 141; *see also id.* at ¶¶ 23, 28.

B. The Allegations Of "Defect."

Plaintiffs do not allege that the monostable shifter itself is defective. Rather, they aver that their vehicles as a whole are "defective" because they are not equipped with a purported "safety override" that Plaintiffs did not pay for and which FCA US did not promise, *i.e.*, an auto-park feature that "puts the Class

Vehicles into park if a driver attempts to exit the vehicle while it is in another gear." *Id.* at ¶¶ 2, 4, 166; *see generally* CMC. Plaintiffs plead that such a feature is necessary to make their vehicles safe even though they admit that their vehicles sound a chime, display a message on the dash, and cannot be turned off unless the park gear is engaged. *Id.* at ¶¶ 4, 166, 193.

C. The NHTSA Investigation And FCA US's Response.

Plaintiffs admit that prior to the initiation of any lawsuit based on the use of a monostable shifter, FCA US provided, free of charge, the exact auto-park feature they claim will make their vehicles safe. *See, e.g.*, CMC ¶¶ 19, 28, 202, 205; *see also id.* at Exs. D, F, G, H. This was done as a motor vehicle recall after the National Highway Transportation Safety Administration ("NHTSA") opened an investigation in August 2015. CMC ¶¶ 190-91; *see also id.* at Exs. A, B.

D. FCA US's Alleged Failure To Disclose And "Knowledge."

Plaintiffs base their claims on FCA US's alleged failure to disclose the so-called "defect," *i.e.*, the lack of an auto-park feature and the risk it supposedly represents. *See, e.g.*, *id.* at ¶¶ 26, 142-43, 145, 180-83. They claim that FCA US had a duty to disclose because it knew or should have known of the "defect" on or before the time each monostable shifter vehicle was sold. *See, e.g.*, *id.* at ¶¶ 180-83, 250, 290. Plaintiffs also allege that FCA US made "repeated claims and advertisements touting its dedication to safety" while knowing a defect existed, but they do not allege that they ever saw any such advertisements. *Id.* ¶ 179.

E. The Classes, Claims Pled, And Relief Sought.

With certain enumerated exceptions, Plaintiffs seek to bring their claims on behalf of a nationwide class, defined as:

> "All persons or entities who purchased or leased a 2012-14 Dodge Charger, 2012-14 Chrysler 300, 2014-15 Jeep Grand Cherokee, 2014 Maserati Quattroporte or 2014 Maserati Ghibli."[1]

Id. ¶¶ 3, 253. Plaintiffs also purport to bring this case on behalf of twenty-seven state-specific subclasses for those "who are residents of … or purchased" their vehicles in Arizona, California, Colorado, Florida, Georgia, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.[2] *Id.*

With four exceptions, each Plaintiff avers that FCA US is liable for: violation of various states' statutory consumer protection laws; fraudulent concealment; unjust enrichment; breach of implied and express warranties; and violation of the Magnuson-Moss Warranty Act. Plaintiff Felker pleads an additional claim for Strict Product Liability under Colorado Law. *Id.* at Colo. Count II. The California Plaintiffs do not plead a claim for unjust enrichment. *See generally*, CMC. The New York Plaintiffs do not plead a claim for implied warranty. *Id.* And Plaintiff Stewart brings only claims for statutory fraud and breach of implied warranty under Louisiana law. *Id.*

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[1] FCA US does not manufacture or sell any Maserati vehicle. FCA US requested that Plaintiffs voluntarily dismiss all allegations relating to Maserati, but as of this filing Plaintiffs have not agreed to do so.

[2] Mr. Beaudin has dismissed his claims without prejudice, and thus claims brought pursuant to Virginia law have been dismissed. *See* Docket No. 49 (Notice of Voluntary Dismissal by Andre Barfield, Gerrett Beaudin).

The CMC sets forth five general and conclusory areas of "injury" allegedly suffered by the named Plaintiffs, all of which are economic loss damages – benefit of the bargain, incidental and consequential damages due to the time necessary to obtain the recall repair, experience of a rollaway incident, diminished functionality due to the recall, and increased rates of vehicle depreciation. *Id.* at ¶¶ 23, 28.

III. ARGUMENT

A. The Applicable Legal Standard.

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitl[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted). A court ruling on a motion to dismiss must disregard conclusory legal allegations. *Iqbal*, 566 U.S. at 678.

B. Plaintiffs' Fraud-Based Claims Fail.

This is not a products liability case seeking damages for personal injury. And, there is no allegation that Plaintiffs' vehicles have ever actually malfunctioned, or that ***any*** vehicle at issue in this lawsuit is prone to any actual malfunction. All that Plaintiffs proffer are allegations establishing that if they misuse their vehicles by exiting them without engaging the park gear, their safety will be at risk. This, of course, is true of any and every vehicle, whether operated by use of a monostable shifter or otherwise. As one court recently found, these types of allegations are no basis for a lawsuit based on alleged fraud:

> "[W]here the basis of an alleged consumer fraud claim is that the seller failed to disclose a safety defect, and where the gravamen of the defect is that the product does not malfunction but lacks certain additional safety features, the claim starts to become less about deception and more about consumer safety, which is not the immediate concern of consumer fraud law.
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> * * *
>
> To countenance such claims would obliterate the distinction between consumer fraud claims and failure-to-warn products liability claims, because, in effect, a seller could be held liable for mere economic loss for failure to disclose hazards of a product, even where the failure to disclose resulted in neither physical injury nor property damage—either of which is required to sustain a true products liability action.

Lassen v. Nissan N. Am., Inc., 2016 WL 5868101, at *13, *15 (N.D. Cal. Sept. 30, 2016). For this reason alone, all fraud claims in the CMC should be dismissed. And, as set forth below, there are a host of additional reasons warranting dismissal of the fraud claims pleaded in the CMC.

1. Failure to Comply With Rule 9(b).[3]

All of Plaintiffs' claims for fraudulent concealment are subject to the mandates of Federal Rule of Civil Procedure 9(b), and, with the exception of Plaintiffs in Georgia, Iowa, Nebraska, New York, Oregon, Pennsylvania, and Washington, all of Plaintiffs' claims for statutory consumer fraud likewise must comply with Rule 9(b). *See, e.g.*, *Newberry v. Silverman*, 789 F.3d 636, 646 (6th Cir. 2015); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009); *Livingston v. Trustgard Ins.*, 988 F. Supp. 2d 873, 879 (N.D. Ill. 2013). Rule 9(b) requires that any "[a]verments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged," or be dismissed. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *see also McGuffin v. Baumhaft*, 2007 WL 956907, at *6 (E.D. Mich. Mar. 28, 2007). For omission claims, a plaintiff must plead facts that "describe the content of the omission and where the omitted information should or could have been revealed, as well as provide representative samples of advertisements, offers, or other representations that plaintiff relied on to make her purchase and that failed to include the allegedly omitted information." *Eisen v. Porsche Cars N. Am., Inc.*, 2012 WL 841019, at *3

[3]Rather than identify each Count consecutively in the CMC, Plaintiffs start numbering the Counts anew for each state. Because of this, the Counts that each argument applies to are more clearly addressed in table form, and thus FCA US attaches such a table hereto as Exhibit B.

(C.D. Cal. Feb. 22, 2012) (citation omitted); *see also Storey v. Attends Healthcare Prods., Inc.*, 2016 WL 3125210, at *10 (E.D. Mich. June 3, 2016). Plaintiffs do not come close to meeting these pleading standards here.

Nowhere in the CMC do Plaintiffs identify the "who, what, where, and how" of any supposed fraud. Instead, Plaintiffs allege only high-level generic and conclusory facts. For example, rather than allege with specificity the "where" and "how" of any alleged fraud, Plaintiffs state only generally that they "review[ed]" or were "expose[d]" to unspecified "advertising messaging regarding safety and reliability." *Id.* ¶¶ 31-141. Plaintiffs do not allege what advertisements they saw, let alone that they relied on any such advertisement in deciding to purchase their vehicles. *Id.*; *see also id.* at ¶¶ 172-76. Without identifying specific communications, stating when they occurred, with whom they occurred, and what form they took, Plaintiffs do not come close to satisfying Rule 9(b)'s standard. *See, e.g., Torres-Hernandez v. CVT Prepaid Sols., Inc.*, 2008 WL 5381227, at *6 (D.N.J. Dec. 17, 2008) (noting that general allegations of concealment are insufficient when "[p]laintiff fails to supply any details as to the character of the marketing and advertising materials").

Plaintiffs' omission/concealment based allegations fare no better. Plaintiffs do not allege that FCA US promised an auto-park feature, or that they did not understand that they had to actively engage the park gear before the vehicle could be safely exited. *See generally* CMC. There is simply nothing in the CMC describing precisely what information was known to FCA US about the operation of the monostable shifter that Plaintiffs did not already know, and which was withheld from them. *Id.* Nor do Plaintiffs aver when or where the omitted information should (or could) have been revealed. *Id.* Likewise, Plaintiffs allege no ***facts*** regarding the person(s) responsible for the failure to disclose, or the context of the omissions, such as the circumstances of Plaintiffs' vehicle purchases, who they talked to, and where they looked for information. *Id.* Nor are there ***facts*** showing how any supposed omission misled Plaintiffs, or what FCA US obtained as a result. *Id.* Plaintiffs also fail to plead exactly when FCA US supposedly knew of the defect or when Plaintiffs were exposed to any fraud. These pleading failures warrant dismissal. *See, e.g.*, *Boris v. Wal-Mart Stores, Inc.*, 35 F. Supp. 3d 1163, 1174 (C.D. Cal. 2014) (dismissing under Rule 9(b) for failure to "specify when [plaintiff] viewed [defendant's] website or when he relied on it"); *Glauberzon v. Pella Corp.*, 2011 WL 1337509, at *9 (D.N.J. April 7, 2011) (dismissing for failure to allege when or how defendant learned of a defect).

2. No Facts Supporting Reliance Or Causation.

To state a claim for statutory fraud under the laws of Arizona, California, Colorado, Georgia, Iowa, Maryland, Massachusetts, Michigan, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Washington, and

Wyoming, and for each of their fraudulent concealment counts, Plaintiffs must allege plausible facts demonstrating that they relied to their detriment on what FCA US did or did not do. *See, e.g.*, *Sardinas v. Geithner*, 2010 WL 3025601, at *2 (D. Nev. July 30, 2010); *Kelly v. Georgia-Pacific LLC*, 671 F. Supp. 2d 785, 799 (E.D.N.C. 2009). And, all of Plaintiffs' statutory and common law fraud Counts require a showing that their claimed injury was caused by FCA US's omission of, or misrepresentation of, a material fact. *See, e.g.*, *Kelly*, 671 F. Supp. 2d at 798; *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986) (en banc).

Plaintiffs' statutory and common law fraud claims are all based on the notion that FCA US told Plaintiffs their vehicles were safe and it failed to tell them that the vehicles had no auto-park feature that would engage the park gear automatically whenever Plaintiffs exited a vehicle without taking the steps necessary to engage park. *See, e.g.*, CMC ¶¶ 26, 142-43, 145, 179, 180-83. But, Plaintiffs do not allege any facts supporting the notion that they had a basis to believe that their vehicles would automatically engage the park gear, and they thus ***relied*** on FCA US to tell them otherwise; nor do they allege that they ***relied*** on their vehicles being equipped with an auto-park feature. *See generally* CMC. And, notably, Plaintiffs effectively admit that drivers do not act differently even when the information supposedly withheld from them is made known. *See, e.g.*, *id.* at ¶¶ 46, 70, 83 (admitting repeated failures to place vehicle in park even after purported rollaway incident).

Moreover, Plaintiffs' admissions establish that FCA US's purported omissions or representations cannot possibly be the ***cause*** of their alleged injuries. Plaintiffs effectively admit that their own intervening acts – failing to engage the park gear – is the ultimate and necessary prerequisite to the threat of any injury. Since the allegations establish that those intervening acts did not change even when consumers became fully aware of the allegedly withheld information, there cannot possibly be any causal link between the alleged threatened safety issue and the omission of information about it. *See*, *e.g.*, *id.* at ¶¶ 46, 70, 83.

3. Additional Flaws In Plaintiffs' Omission Claims.

Nearly all of Plaintiffs' claims are based on omissions, though the CMC is vague, at best, as to whether the purported omission is simply the lack of an auto-park feature or the failure of FCA US to specifically say "your vehicle does not have an auto-park feature." To the extent it is the former, Plaintiffs' fraudulent concealment and statutory fraud-by-omission claims must be dismissed as to all states. Failing to install a feature that a consumer was never promised and that a manufacturer was not duty-bound to provide is not an "omission" encompassed by common-law or statutory fraud. *See, e.g., Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1276 (2006). Omission and concealment claims require that a defendant failed to reveal ***facts*** to the plaintiffs; they cannot be based on a purported failure to provide a component never bargained for. *See, e.g.*, *Lassen*, 2016 WL 5868101, at *8-15 (dismissing omission claim where plaintiffs did not allege they were promised a vehicle that contained an auto-off feature). Moreover, as set forth below, to the extent the omission is intended to be a failure to say "there is no auto-park," the CMC is likewise deficient.

a. *No facts establishing prior knowledge.*

To base their omission claims on the withholding of certain information, Plaintiffs must plead facts showing that FCA US had pre-sale knowledge that the vehicles were defective without an auto-park. *See, e.g.*, *McDaniel v. Denver Lending Grp., Inc.*, 2009 WL 1873581, at *10 (D. Colo. June 30, 2009) ("Pursuant to Colorado law, fraudulent concealment can only be shown by alleging that the defendant knowingly concealed a material fact."). But, the CMC is devoid of facts supporting pre-sale knowledge. There are no averments that FCA US knew, prior to the sale of each Plaintiff's vehicle, that the driver of a vehicle equipped with a monostable shifter would be any more likely to leave the vehicle without putting it in park than the driver of any other vehicle. *See generally* CMC.

Simply setting forth anecdotal consumer "complaints" posted on the internet by unknown individuals (*id.* at ¶ 181) does not establish such knowledge. *See, e.g.*, *Gotthelf v. Toyota Motor Sales, U.S.A., Inc.*, 525 F. App'x 94, 104 (3d Cir.

2013); *McQueen v. BMW of N. Am., LLC*, 2014 WL 656619, at *4 (D.N.J. Feb. 20, 2014). And, in any event, there are no allegations that FCA US was aware of any complaints posted on the internet; nor are there any allegations that the number of complaints posted had any statistical significance based on the number of vehicles sold (and they did not), or at what point the complaint rate was enough such that FCA US should have acquired knowledge of a supposed defect. Giving Plaintiff the benefit of every doubt, all their allegations establish is a complaint rate of approximately .11% since 2011, as they admit that for "an estimated 811,586" vehicles, there were only "hundreds of complaints." CMC ¶¶ 184, 202.

The failure to allege facts establishing pre-sale knowledge requires dismissal of the fraudulent concealment claims under all states' laws, and the statutory fraud claims brought under the laws of Arizona, California, Colorado, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Wisconsin, and Wyoming. *See, e.g.*, WYO. STAT. § 40-12-105(a); *Woods v. Maytag Co.*, 2010 WL 4314313, at *16 (E.D.N.Y. Nov. 2, 2010); *Javitt v. Cunningham Contracting, Inc.*, 2016 WL 4493367, at *4 (Md. Ct. Spec. App. Aug. 26, 2016).

b. *No facts pleaded establishing a duty to disclose.*

"[M]ere nondisclosure is insufficient" to support an omission-based statutory or common law fraud claim because there must be a duty to disclose.

Gason v. Dow Corning Corp., 170 F. Supp. 3d 989, 997 (E.D. Mich. 2016), *aff'd*, 2017 WL 65564 (6th Cir. Jan. 6, 2017). But, here Plaintiffs have alleged little more than nondisclosure. They do not "allege facts either showing that the alleged omissions are 'contrary to a representation actually made by the defendant, or showing an omission of a fact the defendant was obliged to disclose.'" *Davidson v. Kimberly-Clark Corp.*, 76 F. Supp. 3d 964, 972 (N.D. Cal. 2014) (quoting *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006)). Indeed, Plaintiffs have not pleaded facts supporting ***any*** actionable affirmative representation, and this failure mandates dismissal. *See, e.g.*, *Thunander v. Uponor, Inc.*, 887 F. Supp. 2d 850, 867-68 (D. Minn. 2012) (dismissing statutory fraud and fraudulent concealment claims where plaintiff failed to plead specific facts demonstrating that defendant tested the allegedly defective product, was aware that it did not comply with established safety standards, and "used the advertising as a means of furthering the concealment").

Plaintiffs likewise do not plead any other facts establishing a duty to disclose. Absent a fiduciary relationship (which is not claimed here), a duty to disclose generally exists only where the defendant has superior or exclusive knowledge, actively conceals material facts, or makes a partial representation while suppressing material facts. *See, e.g.*, *Crown Castle USA Inc. v. Fred A. Nudd Corp.*, 2008 WL 163685, at *9 (W.D.N.Y. Jan. 16, 2008), *modified on* *reconsideration*, 2008 WL 3841298 (W.D.N.Y. Aug. 13, 2008); *see also Boiardi v. Freestate*, 2013 WL 5410131, at *16 (D. Md. Sept. 25, 2013). The CMC is devoid of any allegations supporting any of these circumstances.

Plaintiffs seem to be trying to establish a duty to disclose based on the notion that FCA US had exclusive knowledge of facts not known to them. However, they do not aver that they were led to believe that their vehicles had an auto-park feature, or that they could exit their vehicles without first engaging the park gear. *See generally* CMC. Nor could they plausibly allege this as courts have recognized that it is common knowledge that a driver must engage the park gear before exiting a vehicle. *See, e.g.*, *Horibin v. Providence & Worcester R.R. Co.*, 352 F. Supp. 2d 116, 121 n.7 (D. Mass. 2005) (noting that engaging the park gear and setting the parking brake are normal steps in shutting down a vehicle); *People v. Superior Court*, 478 P.2d 449, 459 (Cal. 1970) ("When a driver stops his car in a situation in which he knows he may alight from the vehicle, it is both customary and prudent for him to apply his parking brake.").

Plaintiffs also do not, and cannot plausibly, allege that they believed their vehicles would automatically engage park when they exited. Nor can they plausibly claim that the failure to tell them that their vehicles would not automatically engage park led them to exit their vehicles without engaging the park gear. If Plaintiffs really believed that their vehicles would automatically engage park without any affirmative action by them, one would assume they would not have bothered to engage park from day one; however, most of them do not even allege that they ***ever*** failed to actively engage the park gear. In reality, this case is not about Plaintiffs' lack of knowledge at all, as is demonstrated by the fact that even after some Plaintiffs absolutely knew through experience (if nothing else) that their vehicle would not automatically park, they nevertheless continued to fail to place it in park prior to exiting. *See, e.g.*, CMC ¶¶ 46, 70, 83.

In a case strikingly similar to this one, the court dismissed statutory and common law fraud claims brought by purchasers of vehicles equipped with a smart key system, finding their allegations of superior knowledge to be too conclusory to support a duty to disclose. *Taragan v. Nissan N. Am, Inc.*, 2013 WL 3157918, at *8 (N.D. Cal. June 20, 2013). In *Taragan*, the plaintiffs alleged that the vehicle manufacturer was liable because the smart key system in its vehicles was a "safety hazard" since it allowed the driver to shut the vehicle off and take the smart key with him without the park gear being engaged. *Id.* at *3. The court found that conclusory allegations of the manufacturer being in a "superior position" to know about the risk of a rollaway created by failing to engage park were legally insufficient. *Id.* at *6, *8-9.

Plaintiffs have also failed to establish a duty to disclose based on active concealment. "An allegation of active concealment must plead more than an omission; rather, a plaintiff must assert affirmative acts of concealment." *Id.* at *7; *see also Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 196 (M.D.N.C. 1997). If it were otherwise, "the duty requirement would be subsumed and any material omission would be actionable. This is not the law." *Gray v. Toyota Motor Sales, U.S.A.*, 2012 WL 313703, at *9 (C.D. Cal. Jan. 23, 2012).

Plaintiffs' only allegations of "active concealment" are entirely conclusory and simply repeat the omissions which underlie the alleged fraud. *See, e.g.*, CMC ¶ 282 ("FCA willfully failed to disclose and actively concealed the defectively designed Defective Shifter"). This is not enough. *See, e.g.*, *Taragan*, 2013 WL 3157918, at *7 (rejecting "[p]laintiffs['] attempt to predicate the existence of [defendant's] duty on the bare allegation that '[defendant] actively concealed from Plaintiffs and the Class Members the fact that the Subject Vehicles contained the Defect and poses a serious risk'").

Furthermore, because Plaintiffs have alleged no actionable affirmative misrepresentations at all, they have failed to establish a duty to disclose based on a partial disclosure. CMC ¶ 142; *see also generally* CMC. And, Plaintiffs do not even attempt to support any other theory creating a duty to disclose. Notably, it is a stretch of great magnitude for Plaintiffs Willis, Stewart, Schultz, Berken, Brooks, Metzgers, Phelps, Marble, and Hughes to suggest that FCA US should have disclosed something to them before or during their purchase transactions since they purchased their vehicle "used" from third-parties. *See id.* at ¶¶ 47, 55, 59, 71, 73, 114, 126, 130, 138. These individuals do not say how or where FCA US could have gotten information to them before or at the time of a used vehicle transaction. Indeed, at least one court has found that allegations that a vehicle manufacturer misrepresented and omitted material information at the time of sale are "implausible" as applied to used vehicle purchases. *See Szymczak v. Nissan N. Am., Inc.*, 2011 WL 7095432, at *15 (S.D.N.Y. Dec. 16, 2011).

4. No Facts Supporting Any Affirmative Misrepresentations.

Plaintiffs Brooks, Mack, Sheppard, Cruz, and Weber do not allege that they ever viewed any representation by FCA US prior to purchasing their vehicle. CMC ¶¶ 73-77, 92-97, 102-03, 110-11. As such, their statutory consumer fraud claims fail as a matter of law to the extent they are based on affirmative misrepresentations. *See, e.g.*, *Sanchez v. Ford Motor Co.*, 2014 WL 2218278, at *2 (D. Colo. May 29, 2014) (finding advertisements that named plaintiff never saw could not have caused him any injury); *McCall v. Monro Muffler Brake Inc.*, 2013 WL 3418089, at *3 (E.D. Mo. July 8, 2013) ("Because Plaintiffs did not see the alleged misrepresentation, there can be no causal connection and any loss cannot provide the basis of a claim."); *Gale v Int'l. Bus. Mach. Corp.*, 781 N.Y.S.2d 45, 47 (2004) ("[I]f plaintiff did not see any of these statements, they could not have been the cause of his injury.") (citations omitted).

The remaining Plaintiffs' affirmative misrepresentation claims suffer from this same flaw, plus others. Even if these Plaintiffs had alleged ***facts*** as to when and where they saw and relied on each of the representations they set forth (which they do not), their claims would still not be viable. The purported "misrepresentations" these Plaintiffs claim they were "exposed to" or reviewed are those indicating their vehicles were "safe" and "reliable." *See, e.g.*, CMC ¶¶ 31-141. These statements are quintessential examples of non-actionable puffery. *See, e.g.*, *Vitt v. Apple Comput., Inc.*, 469 F. App'x 605, 607 (9th Cir. 2012); *Glass v. BMW of N. Am., LLC*, 2011 WL 6887721, at *7 (D.N.J. Dec. 29, 2011); *Hoffman v. A. B. Chance Co.*, 339 F. Supp. 1385, 1388 (M.D. Pa. 1972).

5. Failure To Provide The Requisite Pre-Suit Notice.

To pursue a claim for violation of the California, Georgia, Massachusetts, Texas, or Wyoming consumer protection statutes, a plaintiff is required to provide a pre-suit demand letter "identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered." *See, e.g.*, MASS. GEN. LAWS Ch. 93A § 9; WYO. STAT. § 40-12-109. A demand letter "listing the specific deceptive practices claimed" is required to "facilitate the settlement and damage assessment aspects" of the statute, "and as such the letter and notice therein is a procedural requirement, the absence of which is a bar to suit." *Entrialgo v. Twin City Dodge, Inc.*, 333 N.E.2d 202, 204 (Mass. 1975). Plaintiffs

Gillipsie, Hartt, D'Onofrio, Craig, Foreman, Dial, Waggoner, and Magnuson failed to comply with this pre-suit requirement as ***they never sent a demand letter at all***. And while Plaintiffs Goldsmith, Nathan, Pietri, Youngstrom, Machtley, Hyatt, and Phelps did send a single demand letter for all of them combined, this letter failed to comply with the pre-suit requirement because it was sent weeks ***after*** filing their lawsuit, not before. *See* CMC ¶¶ 364, 572, 883, 1744, 2067 (admitting letter was not sent until July 8, 2016); *Wall v. FCA US LLC*, Case No. 5:16-cv-01341 (C.D. Cal.), Docket No. 12 (case filed by all these Plaintiffs on June 23, 2016).

Even if the demand letter here had been timely (and it was not), it did not comply with the statutory notice requirements because it was generic to the extreme. Indeed, the very basics were missing as nothing in the letter: identified where and when each Plaintiff purchased his/her vehicle; indicated whether, and if so, where and when a "failure to achieve park" incident occurred; or revealed whether anyone paid any money for any vehicle repair at any time. The absence of such information precluded FCA US from having "an opportunity to review the facts and the law involved," and also failed to satisfy the primary requirement of a sufficient demand letter, which is "(1) to encourage negotiation and settlement by notifying prospective defendants of claims arising from allegedly unlawful conduct and (2) to operate as a control on the amount of damages which the complainant can ultimately recover." *Spring v. Geriatric Auth. of Holyoke*, 475 N.E.2d 727

(Mass. 1985); *see also id.* (dismissing Massachusetts statutory fraud claim where pre-suit demand letter did not "reasonably describe the injury suffered" and was "silent as to the relief requested"); *In re Liberty Mut. Fire Ins. Co.*, 2010 WL 1655492, at *5 (Tex. Ct. App. Apr. 27, 2010) (rejecting notice letter because it did not provide "specific factual allegations" or "specify the amount of damages"). The statutory fraud claims brought by the California, Georgia, Massachusetts, Texas, and Wyoming Plaintiffs thus must be dismissed.

6. The Bar Of The Economic Loss Doctrine.

When, as here, a plaintiff alleges only economic loss such as benefit-of-the-bargain damages, and not damages for any injury outside of the allegedly defective product itself, the economic loss doctrine bars any common law claim for fraud in Colorado, Florida, Maryland, Michigan, Minnesota, New Jersey, North Carolina, Pennsylvania, and Utah. *See, e.g.*, *Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc.*, 532 N.W.2d 541, 545 (Mich. Ct. App. 1995). Because only economic losses are sought by Plaintiffs here, the common law fraud claims brought under the laws of these states must be dismissed.

Additionally, the economic loss doctrine bars statutory consumer fraud claims in both North Carolina and Pennsylvania. *See Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 626-27 (M.D.N.C. 2006); *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 675-71 (3d Cir. 2002). Thus, the consumer fraud claims brought under the laws of North Carolina and Pennsylvania must be dismissed.

7. State-Specific Bases For Dismissing Fraud Claims.

Ohio – The Hacketts: This Court should dismiss the class allegations in Ohio Count I for lack of the required statutory notice. A consumer may not pursue a class action under the Ohio Consumer Sales Protection Act ("OCSPA") unless the supplier had prior notice that its conduct was "substantially similar to an act or practice previously declared to be deceptive." *McKinney v. Bayer Corp.*, 744 F. Supp. 2d 733, 743 (N.D. Ohio 2010); *see also* OHIO REV. CODE ANN. § 1345.09(B). Notice must be provided by "(1) a rule adopted by the Ohio Attorney General; or (2) a judicial decision involving substantially similarly conduct." *McKinney*, 744 F. Supp. 2d at 743. "It is well-established that lack of prior notice requires dismissal of class action allegations." *Id.*

In the CMC, Plaintiffs Joby & Danielle Hackett opt for the "judicial decision" type of "prior notice." *See* CMC ¶ 1472. However, none of the cases they cite satisfy the "prior notice" requirement because none involved a vehicle that had not actually malfunctioned with the claim being premised only on the notion that the consumer was deceived because his vehicle lacked a single safety feature not bargained for at the time of sale. And, notably, several of the cases do not even address vehicles sales.

The cases that do address sales of motor vehicles are not remotely similar to this case or are so vague as to what was at issue that no court could possibly construe them as having given FCA US notice that its act in using a new shifter innovation would be construed to be deceptive conduct because of the lack of a safety feature never anticipated by either party at the time of sale. For example, in *Mason v. Mercedes Benz USA, LLC* (OPIF #10002382) and *Brickman v. Mazda Motor of Am.*, (OPIF #10001427), the claims were premised on the existence of multiple defects in a single vehicle causing malfunctions. Neither *Mosley v. Performance Mitsubishi aka Automanage* (OPIF #10001326), nor *Walls v. Harry Williams dba Butch's Auto Sales* (OPIF #10001524), provide any information about any type of allegedly deceptive conduct, and thus cannot possibly be construed to provide notice with respect to the alleged deception here. And, in *State ex. rel. Betty D. Montgomery v. Ford Motor Co.* (OPIF #10002123), and *State ex rel. Betty D. Montgomery v. Bridgestone/Firestone, Inc.* (OPIF #10002025), the allegedly deceptive conduct involved advertising about quality with respect to a particular vehicle and component (which has nothing to do with this case). Finally, *Khouri v. Don Lewis* (OPIF #10001995), and *Mark J. Branford v. Joseph Airport Toyota, Inc.* (OPIF #1001586), both dealt with a defendant's failure to comply with specific statutory requirements regarding used car sales.

The other cases Plaintiffs cite for the notice requirement do not even address automotive sales and did not deal with the alleged failure to disclose a purported defect. *See Bellinger v. Hewlett-Packard Co.* (OPIF #10002077) (qualities of ink included in the purchase of a printer); *Borro v. MarineMax of Ohio* (OPIF #10002388) (damage one boat suffered during a crash); *State ex rel. Jim Petro v. Craftmatic Org., Inc.* (OPIF #10002347) (improper high-pressure sales tactics related to sale of beds); *State ex rel. William J. Brown v. Harold Lyons, et al.* (OPIF #10000304) (quality of certain used appliances and repair work); *Brown v. Spears* (OPIF #1000403) (refusal to honor warranty attached to oil furnace).

California – Pietri; Texas – Phelps; Missouri – Brooks: The fraud claims brought by Plaintiffs Pietri (Cal. Counts I, II, III, V), Phelps (Tex. Counts I, II), and Brooks (Mo. Counts I, II), should be dismissed because the facts admitted in the CMC conclusively prove that they could not have been the victims of any type of fraudulent conduct. To state a claim for fraudulent concealment or for a statutory fraud-by-omission claim under California, Texas, or Missouri law, a plaintiff must show that the defendant has actually concealed or failed to disclose a fact prior to, or in connection with, the purchase at issue. *See, e.g.*, *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 (9th Cir. 2012); *Omni USA, Inc. v. Parker-Hannifin Corp.*, 798 F. Supp. 2d 831, 851 n.17 (S.D. Tex. 2011); *Chochorowski*, 404 S.W.3d at 226. But, Pietri, Phelps, and Brooks admit that ***before*** they purchased their vehicles there was ample publicly available information as to the purported defect underlying their claims and the fact that their vehicles did not have an auto-park feature. *See* CMC ¶¶ 42, 77, 127 (admitting that FCA US issued a recall notice regarding the monostable shifter on April 22, 2016, warning "of the Defective Shifter and corresponding safety risk." Pietri, Phelps, and Brooks[4] admit they purchased their vehicles ***after*** the NHTSA recall would have been publicized and ***after*** FCA US issued its notice providing the very information it supposedly concealed. *Id.* at ¶¶ 41, 73, 126.

Arizona – Guy, Perkins, & Yacoub; North Carolina – Gunnells & Sheppard; Massachusetts – Hartt, D'Onofrio, Youngstrom, & Machtley: This Court should dismiss Arizona Count II, Massachusetts Count II, and North Carolina Count II due to a lack of privity. Under Arizona, Massachusetts, and North Carolina law, a claim for fraudulent concealment requires privity between the plaintiff and the defendant. *See Wells Fargo Bank v. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 38 P.3d 12, 34 (Ariz. 2002); *see also Talbott v. C.R. Bard, Inc.*, 865 F. Supp. 37, 52 (D. Mass. 1994); *Bd. of Educ. v. Deitrick*, 18 S.E.2d 704, 704 (N.C. 1942). Guy, Perkins, Yacoub, Gunnells, Sheppard, Hartt, D'Onofrio, Youngstrom, and Machtley all admit they purchased their vehicles from third-parties, not FCA US. *See* CMC ¶¶ 31, 33, 35, 61, 63, 65, 67, 100, 102.

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[4]Plaintiff Brooks' allegations of having been told his vehicle had the recall fix when it did not are allegations unique to him, and not a part of the overall alleged wrongdoing purportedly committed with respect to the putative class.

Georgia – Willis; Minnesota – Berken: Georgia Count II and Minnesota Count II should be dismissed because the consumer fraud statutes in these states require that a plaintiff allege future harm, and only permit injunctive relief. *Tri-State Cons. Ins. Co. v. LexisNexis Risk Sols. Inc.*, 823 F. Supp. 2d 1306, 1327 (N.D. Ga. 2011); MINN. STAT.§ 325.D.45. Willis and Berken face no future harm, and injunctive relief would be moot, since, as they admit, FCA US has already agreed to provide a cost-free cure of the alleged "defect" (*i.e.*, the absence of an auto-park feature). *See, e.g.*, CMC ¶¶ 19, 28, 202, 205; *see also id.* at Exs. D, F, G, H.

Georgia – Willis; Iowa – Havnen; Louisiana – Stewart: Georgia Count I, Iowa Count I, and Louisiana Count I must be dismissed to the extent they are pleaded on behalf of a putative class because the consumer fraud statutes forming the basis of these claims do not permit class actions. *See* GA. CODE ANN. § 10-1-399(a); LA. STAT. ANN. § 51-1409(A); IOWA CODE § 714H.7.

Louisiana – Stewart: Louisiana Count I must be dismissed because claims under the Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPA) are precluded by the Louisiana Products Liability Act (LPLA). The LPLA "clearly and explicitly" declares that a manufacturer cannot be liable for damages caused by its product under any other theory of liability. *See, e.g., Bladen v. C.B. Fleet Holding Co.*, 487 F. Supp. 2d 759, 766-67 (W.D. La. 2007) (dismissing LUTPA claim pursuant to LPLA's exclusive theory of liability).

Colorado – Felker; Minnesota – Berken; Nebraska – Walker; New York – Lynd, Mack, & Cruz; Washington – Stedman & Webster: Colorado Count I, Minnesota Count I, Nebraska Count I, New York Count I, and Washington Count I should be dismissed because the consumer fraud laws in these states require that a plaintiff plead and prove that the public interest is impacted by the alleged wrongful conduct. *See, e.g.*, *Veches v. Majewski*, 2012 WL 2202979, at *10 (Minn. Ct. App. June 18, 2012). Plaintiffs plead no facts supporting this prerequisite here. It is undisputed that the vehicles at issue stay in park if placed in park, and that a safety risk arises ***only if a driver exits the vehicle while it is running and simultaneously fails to shift to park***. *See generally* CMC.

Furthermore, it is undisputed the FCA US has now provided a cost-free auto-park feature that engages in the event a driver does not put his vehicle into park and exits the vehicle while it is running. It is inconceivable that an alleged defect that could not possibly manifest absent customer misuse, and which now cannot manifest even with misuse, could significantly impact the public interest. And, notably, Walker (Nebraska) and Felker (Colorado) no longer even lease or own a vehicle with a monostable shifter, thus making clear they have no claim impacting the public interest. CMC ¶ 78.

Illinois – McDonald & Wells: Illinois Count I must be dismissed because it is based on a criminal statute that has been repealed. *See* CMC Ill. Count I (*citing* 720 IL COMP. STAT. ANN. 295/1A). Even if the statute was still valid (which it is not), the claim would be legally insufficient because that criminal statute provided for no private right of action. *See Sassafras Enters., Inc. v. Roshco, Inc.*, 915 F. Supp. 1, 11 (N.D. Ill. 1996).

New Jersey – Colrick: New Jersey Count I is legally deficient because there is no allegation that the alleged "defect" (whatever it may be) manifested in Plaintiff Colrick's vehicle before the express warranty expired. New Jersey law is clear that absent allegations that a purported defect manifested before the expiration of the warranty period a consumer fraud claim fails. *See, e.g.*, *Wiseberg v. Toyota Motor Corp.*, 2012 WL 1108542, at *4 (D.N.J. Mar. 30, 2012); *Perkins v. DaimlerChrysler Corp.*, 890 A.2d 997, 1004 (N.J. Super. Ct. App. Div. 2006).

C. The Unjust Enrichment Counts Are Legally Deficient.

1. No Facts Pleaded Supporting A Conferred Benefit.

There are no allegations that Plaintiffs conferred a benefit on FCA US by their vehicle purchases as required to state a claim for unjust enrichment. *See generally* CMC. Indeed, Plaintiffs admit that they purchased their vehicles ***from third-parties***, not FCA US. CMC ¶¶31-141. And, notably, Plaintiffs do not claim that they paid for an auto-park feature, and they fail to set forth facts as to how they conferred a benefit on FCA US when it gave them a ***free*** auto-park feature post-sale. *Id.*

"It is [] axiomatic that for a plaintiff to recover for unjust enrichment defendants must in fact be enriched." *Litman, Asche & Gioiella, LLP v. Chubb Custom Ins. Co.*, 373 F. Supp. 2d 314, 318 (S.D.N.Y. 2005) (citation omitted); *see also A & M Supply Co. v. Microsoft Corp.*, 2008 WL 540883, at *2 (Mich. Ct. App. Feb. 28, 2008) (affirming dismissal of unjust enrichment claim against Microsoft brought by indirect purchasers).

Plaintiffs' allegation that that FCA US was unjustly enriched by vehicle owners visiting dealerships to obtain the ***free*** auto-fix feature defies logic. *See* CMC ¶¶ 25, 231-33. And, this lack of logic is crystal clear when one considers that there is no allegation that any Plaintiff spent a single cent at a dealership while there to get a free auto-park. All unjust enrichment claims should be dismissed.

2. An Adequate Remedy At Law Precludes Unjust Enrichment.

Every state from which Plaintiffs hail, with the single exception of Wyoming, precludes unjust enrichment claims when a plaintiff has an adequate remedy at law. *See, e.g., Martinez v. Weyerhaeuser Mortg. Co.*, 959 F. Supp. 1511, 1518 (S.D. Fla. 1996). The facts pleaded in the CMC make clear that the pleaded legal claims provide a sufficient avenue for Plaintiffs to be made whole. Thus, all unjust enrichment claims, except that pleaded under Wyoming law, should be dismissed.

3. As Indirect Purchasers Plaintiffs Have No Unjust Enrichment Claim.

Plaintiffs admit they did not purchase their vehicles from FCA US, making their unjust enrichment claims under Arizona, Florida, Georgia, Massachusetts, Michigan, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, Washington, Wisconsin, and Wyoming law legally infirm. *See* CMC ¶¶ 31-141; *see also, e.g., Waters v. Electrolux Home Prods., Inc.*, 154 F. Supp. 3d 340, 351 (N.D.W.V. 2015) (applying Ohio law); *Oliver v. Funai Corp., Inc.*, 2015 WL 3938633, at *13 (D.N.J. June 25, 2015).

4. Unjust Enrichment Is Not A Claim In Texas.

Unjust enrichment is not a recognized cause of action in Texas. *Gedalia v. Whole Foods Mkt. Servs., Inc.*, 53 F. Supp. 3d 943, 961 (S.D. Tex. 2014). Accordingly Texas Count V must be dismissed.

D. No Viable Express Warranty Claim Exists For The "Defect" At Issue.

1. No Allegations Of An Applicable Warranty.

In every state, a claim for breach of express warranty requires that a warranty exist. *See, e.g., Ruffin v. Shaw Indus., Inc.*, 149 F.3d 294, 302 (4th Cir. 1998); *Gross v. Stryker Corp.*, 858 F. Supp. 2d 466, 501-02 (W.D. Pa. 2012). Plaintiffs base all their express warranty claims on the 3 year/36,000 mile "New Vehicle Limited Warranty" provided by FCA US with the sale of a new vehicle, as well as the part of that warranty that covers certain specified powertrain components for 5 years/100,000 miles. *See, e.g.*, CMC ¶¶ 314, 402, 458. That warranty provides:

> The Basic Limited Warranty covers the cost of all parts and labor needed to repair any item on your vehicle when it left the manufacturing plant that is defective in material, workmanship or factory preparation.

See Ex. C, p. 5; Ex. D, p. 5; Ex. E, p. 5; Ex. F, p. 5; Ex. G, p. 5.[5]

Plaintiffs' express warranty claims are flawed at their core because there is no allegation in the CMC that any "item on [Plaintiffs'] vehicle" actually has a defect. Indeed, Plaintiffs' claims are based on the notion that the "defect" is the ***absence*** of an "item", *i.e.*, an auto-park feature. Since the auto-park feature was ***not*** an "item on your vehicle when it left the manufacturing plant," the New Vehicle Limited Warranty simply does not apply.

Furthermore, the allegations of the CMC do not even suggest that the monostable shifter itself is defective. To the contrary, the allegations allow for only one conclusion: the monostable shifter operates exactly as it was designed to operate so that when placed in the park position, the vehicle is in that gear and remains there until a driver takes it out of that gear. Because the monostable shifter performs exactly as it was designed to perform, it cannot be deemed "defective" for purposes of an express warranty claim. *See Clemens v.*

[5]The New Vehicle Limited Warranty is integral to Plaintiffs' claims, and thus this Court may consider it in ruling on this 12(b)(6) motion. *See Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335-36 (6th Cir. 2007).

DaimlerChrysler Corp., 534 F.3d 1017, 1022-23 (9th Cir. 2008) (affirming dismissal of express warranty claim where product performed as warranted); *Tae Hee Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 978-79 (C.D. Cal. 2014) ("Plaintiffs cannot establish a breach of express warranty where there are no allegations that Plaintiffs actually experienced a problem … and sought a repair during the express warranty period.").

In scattered conclusory allegations, Plaintiffs claim that the monostable shifter, itself, has some undefined design defect. *See, e.g.*, CMC ¶ 245 ("Defective Shifter is unsafe and defectively designed"); *id.* at ¶ 270 ("The Class Vehicles share a common design defect in that the Defective Shifter is defectively designed"). But, even if these conclusory allegations were deemed to be sufficient, Plaintiffs' express warranty claims would still have to be dismissed because it is axiomatic that express warranties covering defects in "material" and "workmanship," like those at issue here, do not cover design defects. *See, e.g.*, *Cali v. Chrysler Grp. LLC*, 2011 WL 383952, at *2 (S.D.N.Y. Jan. 18, 2011), *aff'd*, 426 F. App'x 38 (2d Cir. 2011) ("Chrysler's Basic Limited Warranty covers only defects in 'material, workmanship or factory preparation'—not defects in vehicle design."); *see also Nelson v. Nissan N. Am., Inc.*, 2014 WL 7331075, at *2-3 (D.N.J. Dec. 19, 2014) (collecting cases supporting finding that "absent specific language to the contrary, design defects cannot be encompassed within the meaning of defects in workmanship or materials"). All express warranty claims must be dismissed.

2. Failure To Provide Required Pre-Suit Notice.

With the exception of New York, all of Plaintiffs' express warranty claims must be dismissed for failure to plead facts establishing that FCA US was provided with specific notice of the alleged breach prior to the filing of any legal claim. *See, e.g.*, *Monticello v. Winnebago Indus., Inc.*, 369 F. Supp. 2d 1350, 1358 (N.D. Ga. 2005); *Gorman v. Am. Honda Motor Co., Inc.*, 839 N.W.2d 223, 229-30 (Mich. Ct. App. 2013). A "remote manufacturer" like FCA US is entitled to notice either "by way of notice provided directly to [it], or through notice provided to [it] by the direct seller from the buyer;" presenting a vehicle for repairs to a dealership is not sufficient. *McCabe v. Daimler AG*, 948 F. Supp. 2d 1347, 1360 (N.D. Ga. 2013). Nor is purported notice via customer complaints or a NHTSA investigation. *E.g.*, *Garcia v. Chrysler Grp. LLC*, 127 F. Supp. 3d 212, 226 (S.D.N.Y. 2015) (alleged notice to vehicle manufacturer by way of "consumer complaints submitted to it and to the NHTSA" and through "recalls and technical service bulletins" was legally insufficient because such allegations do not "plausibly allege how these events gave notice of ***plaintiffs'*** breach of warranty claims") (emphasis in original).

In this case, only Plaintiffs Goldsmith, Nathan, and Pietri plead they gave actual notice, but, even then, they set forth no details of when and how this occurred. And, notably, no Plaintiff alleges the provision of notice of a needed, but rejected, repair (*i.e.*, the act necessary to breach the Warranty) within the 3-year/36,000-mile durational limits. Without notice of a breach within the warranty period, Plaintiffs' express warranty claims fail because "the general rule is that an express warranty does not cover repairs made after the applicable time or mileage periods have elapsed." *Abraham v. Volkswagen of Am., Inc.*, 795 F.2d 238, 250 (2d Cir. 1986) (collecting cases); *see also McCabe*, 948 F. Supp. 2d at 1359 (under Georgia law, plaintiffs must allege "that they presented their vehicles for repairs within the warranty period").

3. The Express Warranty Is Not Actionable Under The Illinois UCC.

In Illinois Count III, Plaintiffs McDonald and Wells purport to plead a claim for breach of express warranty under § 2-313 of the Illinois Uniform Commercial Code. However, they base this claim entirely on the written 3 year/36,000 miles "New Vehicle Limited Warranty," which promised nothing other than free repairs during the time/mileage limitation. This claim must be dismissed as legally insufficient because the Illinois Supreme Court has held that a fix and repair warranty, like that at issue here, is not actionable as a UCC warranty. *See Mydlach v. DaimlerChrysler Corp.*, 875 N.E.2d 1047, 1058 (Ill. 2007). The warranty underlying this claim "does not warrant that the vehicle will conform to some affirmation, promise, description, sample or model. Rather the warranty promises only that the manufacturer will repair or replace defective parts during the warranty period." *Id.* It thus provides no basis for a UCC express warranty claim.

E. The Claims For Breach Of Implied Warranty Are Fatally Flawed.

1. The Vehicles Are Fit For Their Ordinary Purpose.

Plaintiffs based their breach of implied warranty claims on conclusory allegations that their vehicles "were not in merchantable condition" and were "not fit for the ordinary purpose for which cars are used" because they "are inherently defective in that the Defective Shifter was not adequately designed, manufactured, and tested." *See, e.g.*, CMC ¶ 1775. According to Plaintiffs, this inadequate design in the vehicles results because they do "not include a safety override to prevent rollaway incidents." *See, e.g.*, CMC ¶ 1507.

But, the ***factual*** allegations of the CMC conflict with Plaintiffs' conclusory averments that their vehicles are unmerchantable. Plaintiffs admit that if they operate their vehicles as intended and put the monostable shifter into the park position before exiting their vehicles, there will be absolutely no problem at all. Indeed, most Plaintiffs do not allege that they have ever had, or that they even anticipate having, any problem with the monostable shifter.

"[T]he weight of authority, from courts across the country, indicates that plaintiffs may not recover for breach of implied warranty of merchantability for vehicles which are [ ] minimally fit for the ordinary purpose of providing basic transportation, and which satisfy a minimum level of quality, even if they fail to perform exactly as the buyer expected." *Haag v. Hyundai Motor Am.*, 969 F. Supp. 2d 313, 317 (W.D.N.Y. 2013); *see also, e.g.*, *Yost v. Gen. Motors Corp.*, 651 F. Supp. 656, 657-58 (D.N.J. 1986) (allegation that part was "'likely' to cause damage and 'may' create potential safety hazards" insufficient); *Soto v. CarMax Auto Superstores, Inc.*, 611 S.E.2d 108, 110 (Ga. Ct. App. 2005) (a vehicle is merchantable if it is "capable of being driven").

Plaintiffs do not allege that their vehicles are unfit for driving. At best they allege that ***if*** they fail to move the monostable shifter to the park position, and ***if*** they exit their vehicles with the motor still running, an unsafe condition ***might*** result. *See* CMC, ¶¶ 157-65. This speculative series of events does not negate the ability of their vehicles to provide safe and reliable transportation when they are operated in a common, normal, everyday fashion and as intended. Furthermore, even if Plaintiffs engage in the misuse that they claim to fear, this would in no way affect their vehicles' ability to transport, but only affect what happens after the vehicle comes to a stopped and intended-park position.

It is truly astounding that Plaintiffs claim that their vehicles are, in the legal sense, unmerchantable because they might misuse them and there is no "safety override" if they do. Before this lawsuit was filed FCA US provided the very "safety override" which, according to Plaintiffs, ensures their safety when they misuse their vehicles. *See* CMC, Exs. D, F, G, H. In other words, even if Plaintiffs' vehicles were at one time "unmerchantable" (which they were not), no breach of the implied warranty occurred because FCA US corrected that alleged "unmerchantable" condition for free before Plaintiffs ran to the courthouse. The implied warranty claims should be dismissed.

2. No Manifestation Of Any Defect While Implied Warranty In Effect.

FCA US's Limited Warranties expressly indicate that all implied warranties are limited "to the time periods covered by the express written warranties contained in this booklet." *See* Ex. C at 4; D at 4; E at 4; F at 4; G at 4. With the exception of Massachusetts, this limitation of the implied warranties is valid and enforceable under the laws of every state which Plaintiffs invoke. *See, e.g.*, *Moore v. Coachmen Indus., Inc.*, 499 S.E.2d 772, 778 (N.C. Ct. App. 1998). There are no allegations in the CMC of any breach of the implied warranty during its 3 year/36,000 miles duration. Thus, dismissal is warranted. *See, e.g.*, *McCalley v. Samsung Elecs. Am. Inc.*, 2008 WL 878402, at *7 (D.N.J. Mar. 31, 2008) (where defect did not manifest until after express warranty expired "[p]laintiff's breach of implied warranty claim fails because the duration of the implied warranty period is consistent with the express warranty period").

3. The Implied Warranty Claims Barred Due To A Lack Of Privity.

Plaintiffs all admit that they purchased their vehicles from a third-party, not

FCA US. CMC ¶¶ 31-141. The laws of Arizona, California (UCC claim only), Florida, Georgia, Illinois, Iowa, Michigan, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Washington, and Wisconsin are clear and unequivocal that privity is required to maintain an implied warranty claim. *See*, *e.g.*, *Harnden v. Ford Motor Co.*, 408 F. Supp. 2d 315, 322 (E.D. Mich. 2005) (collecting cases requiring privity to bring an implied warranty claim); *Plagens v. Nat'l RV Holdings*, 328 F. Supp. 2d 1068, 1073 (D. Ariz. 2004) ("[A]bsent privity of contract, a purchaser cannot maintain a claim for breach of implied warranty under the U.C.C. against a manufacturer."). The breach of implied warranty claims pleaded under the laws in these states must therefore be dismissed.

4. Lack Of Manifestation Requires Dismissal.

In California, Georgia, Illinois, Maryland, Missouri, New Jersey, Ohio, Oklahoma, Pennsylvania, Texas, and Wisconsin, courts recognize that unless a product actually manifests the alleged defect, no cause of action for breach of implied warranty is actionable. For example, in *American Suzuki Motor Co. v. Superior Court*, 44 Cal. Rptr. 2d 526 (Cal. Ct. App. 1995), the plaintiffs alleged that their vehicles, and others like them, had an "an unacceptable risk of a deadly roll-over accident when driven under reasonably anticipated and foreseeable driving conditions.'" *Id.* at 528. In a ruling equally applicable here, the California court held that, as a matter of law non-incident owners:

> are not entitled to assert a breach of implied warranty action against Suzuki … To hold otherwise would, in effect, contemplate indemnity for a potential injury that never, in fact, materialized. And, compensation would have to be paid for a product 'defect' that was never made manifest, in a product that for the life of any warranty actually performed as Suzuki guaranteed.

Id. at 526.

Similarly, in *Taragan*, the court dismissed the plaintiffs' implied warranty claim finding that "none of the Plaintiffs has actually experienced a rollaway incident," and even if they had, the incident would have had to result in injury to state a claim. 2013 WL 3157918, at *4; *see also Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (affirming dismissal of implied warranty claims brought under multiple states' laws because "[w]here … a product performs satisfactorily and never exhibits an alleged defect, no cause of action lies"). The facts here are indistinguishable from those in *Suzuki*, *Taragan*, and *Briehl*. Thus, dismissal of the implied warranty claims brought under the laws of California, Georgia, Illinois, Maryland, Missouri, New Jersey, Ohio, Oklahoma, Pennsylvania, Texas, and Wisconsin is warranted.

5. Claims Barred Due To A Lack Of Pre-Suit Notice.

With the exception of Arizona and Colorado, all Plaintiffs' implied warranty claims fail for the additional reason that Plaintiffs did not provide FCA US with notice of any alleged breach before bringing this suit. Notice of breach is a condition precedent to recovery. *See, e.g.*, *Canady v. Ortho-McNeil Pharm., Inc.*, 2014 WL 4930675, at *4-5 (N.D. Ohio Oct. 1, 2014) (applying Oregon law); *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 930 (N.D. Cal. 2012) (applying California and Washington law). Plaintiffs cannot, as they attempt to do, meet the notice requirement by citing to customer complaints. *See, e.g.*, CMC ¶ 848. Plaintiffs are required to show that they gave notice of their precise claim. *See, e.g.*, *Lynx, Inc. v. Ordnance Prods., Inc.*, 327 A.2d 502, 514 (Md. Ct. App. 1974) (letter referring to product quality issues did not suffice as notice of breach of warranty or the "particular contract, sale or transaction" at issue).

6. The Louisiana Implied Warranty Claim Is Precluded.

Louisiana Count II for breach of implied warranty must be dismissed for the additional reason that it is legally insufficient and preempted in part. Plaintiff Stewart brings his implied warranty claim pursuant to §§ 2520 and 2524 of the Louisiana Revised Statutes. A § 2520 claim requires pleading facts showing that a product is either totally useless or of diminished usefulness. *See, e.g.*, *Williams v. Janssen Pharms., Inc.*, 2016 WL 6127526, at *3 (W.D. La. Oct. 20, 2016). Nothing in the CMC suggests Stewart's vehicle is useless, or that it has diminished usefulness. Furthermore, and in any event, a purported "defect" that is obvious to a buyer at the time of purchase is not actionable under § 2520. *See, e.g.*, *Johnson v. CHL Enters.*, 115 F. Supp. 2d 723, 728 (W.D. La. 2000). There can be no earnest dispute as to the fact that how the monostable shifter operated, and the need for a driver to place the shifter in the park position to engage the park gear, were obvious at the time of purchase. Accordingly, the § 2520 claim must be dismissed.

Stewart's implied warranty claim is not saved by his reference to § 2524. Such claims are preempted by the Louisiana Product Liability Act. *See, e.g.*, *Hollybrook Cottonseed Processing, LLC v. Carver, Inc.*, 2010 WL 2195685, at *2-4 (W.D. La. May 28, 2010). Thus, Louisiana Count II should be dismissed.

F. The Legal Insufficiency Of The Magnuson-Moss Warranty Act Claim.

The Circuit Courts are in agreement that a plaintiff who pleads no viable state law warranty claim has no viable claim under the federal Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. § 2301, *et seq.* *See, e.g., Kuns v. Ford Motor Co.*, 543 F. App'x 572, 575 (6th Cir. 2013); *Cooper v. Samsung Elecs. Am., Inc.*, 374 F. App'x 250, 254 (3d Cir. 2010). Plaintiffs' state-law warranty claims fail. Thus, the MMWA claim in Nationwide Count I should be dismissed.

G. Additional Plaintiff-Specific Grounds for Dismissal.

1. Claims Barred By Statutes Of Limitation.

Arizona – Guy & Perkins: The claims pleaded under the Arizona Consumer Fraud Act (Ariz. Count I) by Plaintiffs Guy and Perkins were filed more than one year after their vehicle purchases, and are thus time-barred under ARIZ. REV. STAT. § 12-541(5). *See* CMC ¶¶ 31, 33 (vehicles purchased on Jan. 31, 2015 and Oct. 8, 2014); *Wall v. FCA US LLC*, Case No. 5:16-cv-01341 (C.D. Cal.), Docket No. 12 (Amended Class Action Complaint, originally filed by these Plaintiffs on June 23, 2016) ("Andollo Compl.").

Louisiana – Stewart: Plaintiff Stewart filed his lawsuit more than one year after purchasing his vehicle. *See* CMC ¶ 55 (vehicle purchased on May 13, 2015); CMC, *generally* (first filed on Dec. 23, 2016). His claim for statutory fraud (La. Count I) is thus barred under LA. STAT. ANN. § 51:1409(E), which provides a 1 year statute of limitations for consumer protection claims, and LA. CIV. CODE ANN. art. 2534, which provides a one-year statute of limitations from date of discovery of the "defect" for implied warranty claims.

Massachusetts – Youngstrom: Plaintiff Youngstrom purchased his vehicle in December 2011, but he did not file any lawsuit until June 2016. *See* CMC ¶ 65; Andollo Compl. (first filed on June 23, 2016). Because he did not file any claim within four years of his purchase, Youngstrom's consumer fraud claim under MASS. GEN. LAWS Ch. 93A § 1 *et seq.* (Mass. Count I), and his claims for fraudulent concealment (Mass. Count II), breach of express warranty (Mass. Count III), breach of implied warranty of merchantability (Mass. Count IV), and unjust enrichment (Mass. Count V) are all time-barred. *See* MASS. GEN. LAWS Ch. 260, § 5A (four-year statute of limitations for claims under state consumer protection statute); MASS. GEN. LAWS Ch. 260, §2A (three-year statute of limitations for fraud); MASS. GEN. LAWS Ch. 106 § 2-318 (three-year statute of limitations for express or implied warranty claims); MASS. GEN. LAWS Ch. 260 § 2A (three-year statute of limitations for unjust enrichment).

New Jersey – Colrick: New Jersey has a two-year statute of limitations for fraudulent concealment claims. *See* N.J. STAT. ANN. § 2A:14-2. Plaintiff Colrick did not file his fraudulent concealment claim (N.J. Count II) within two years of his vehicle purchase. *See* CMC ¶ 82 (vehicle purchased on Aug. 27, 2013); Andollo Compl. (first filed on June 23, 2016).

Oklahoma – Clark: Oklahoma has a two-year statute of limitations for fraud and unjust enrichment claims. *See* OKLA. STAT. ANN. tit. 12, § 95(A)(3) (two-year statute of limitations for fraud and other claims); *City of Tulsa v. Bank of Okla., N.A.*, 280 P.3d 314, 320 (Okla. 2011) (two-year limitation in § 95(A)(3) applies to unjust enrichment claims). Plaintiff Clark did not file her claims within two years of her vehicle purchase, and thus they are barred. *See* CMC ¶ 106 (vehicle purchased on Sept. 13, 2014); CMC, *generally* (filed Dec. 23, 2016).

Oregon – Fisher: Oregon has a one-year statute of limitations for claims under the Oregon Unlawful Trade Practices Act. *See* OR. REV. STAT. § 646.638. Plaintiff Fisher did not bring his claim under this statute (Or. Count I) within one year of purchasing his vehicle. *See* CMC ¶ 108 (vehicle purchased on Dec. 9, 2014); Andollo Compl. (first filed on June 23, 2016).

Pennsylvania – Weber & The Metzgers: The statute of limitations in Pennsylvania is two years for claims of fraudulent concealment. *See* 42 PA. CONS. STAT. § 5524(7). The fraudulent concealment claims (Penn. Count II) brought by Plaintiff Weber and Plaintiffs John and Mary Metzger are time-barred because they filed suit more than two years after purchasing their vehicles. *See* CMC ¶¶ 110, 114 (Weber purchased on Sept. 9, 2013, Metzgers on April 7, 2014); Compl. *Weber v. FCA US LLC*, No. 2:16-cv-1257 (E.D. Mich. filed July 8, 2016); Andollo Compl. (first filed on June 23, 2016).

Utah – Marble: Utah has a two-year statute of limitations for claims under its consumer fraud statute (UTAH CODE ANN. §13-11-19(8)), for product liability actions (UTAH CODE ANN. § 78B-6-706), and for breach of warranty in product liability cases (*Utah Local Gov't Tr. v. Wheeler Mach. Co.*, 199 P.3d 949, 951-52 (Utah 2008)). Plaintiff Marble filed his claims under the Utah Consumer Sales Practices Act (Utah Count I), for breach of express warranty (Utah Count III), and for breach of implied warranty (Utah Count V) more than two years after purchasing his vehicle. *See* CMC ¶ 130 (vehicle purchased on Jan. 7, 2014); CMC, *generally* (first filed on Dec. 23, 2016).

Tolling/Estoppel Does Not Apply: Plaintiffs' conclusory allegations of tolling and estoppel cannot save their claims from the statute of limitations. This case does not involve a latent defect such that the discovery rule could apply because the absence of an auto-park feature is readily discernable at any time. Even if it was not, Plaintiffs' allegations are legally insufficient to invoke tolling or estoppel principles. Plaintiffs assert these concepts based on FCA US's purported knowledge of the alleged defect "shortly" after the monostable vehicles entered the market. According to Plaintiffs, this knowledge was gained, *inter alia*, through publicly-available customer complaints made to the NHTSA. CMC ¶¶ 10, 187. In other words, FCA US's purported knowledge sources were also available to Plaintiffs, and these sources that Plaintiffs could have studied puts each of them outside the limitations period. *See, e.g.*, *Stark v. Adv. Magnetics, Inc.*, 736 N.E. 2d 434, 442 (Mass. Ct. App. 2000) (finding that Massachusetts consumer protection act claim accrued when existence of allegedly deceptive act became publically available due to filing of trademark application).

2. No Legally Viable Products Liability Claim Under Colorado Law.

In Colorado Count II, Plaintiff Felker pleads a strict products liability claim. But the Colorado Products Liability Act does not create a substantive cause of action; it simply provides presumptions and defenses for such claims. *See, e.g.*, *Elvig v. Nintendo of Am., Inc.*, 2010 WL 3803814, at *6 n.10 (D. Colo. Sept. 23, 2010). Furthermore, when, as here, a claim is based on disappointed expectations about a product, a duty to protect against an unreasonable risk of harm is not implicated. *Carter v. Brighton Ford, Inc.*, 251 P.3d 1179, 1187 (Colo. Ct. App.

2010) (strict liability attaches only in cases of personal injury or property damage).

H. Lack Of Any Legally Cognizable Injury.

Each of Plaintiffs' claims requires pleading an injury or damage. But, no Plaintiff plausibly alleges that they suffered any injury or damage. This is a fatal pleading deficiency requiring dismissal under Rule 12(b)(6). *See, e.g.*, *Taragan*, 2013 WL 3157918 at *4-5 (dismissing vehicle defect case, in part, because risk of injury was not sufficient to state a claim); *Verb v. Motorola, Inc.*, 672 N.E.2d 1287, 1296 (Ill. App. Ct. 1996) (dismissing implied and express warranty, statutory consumer fraud, common law fraud, and Magnuson-Moss Act claims because they were "all based upon mere theoretical possibilities of injury and/or damages"). Furthermore, Plaintiffs' allegations of benefit-of-the-bargain damages are facially implausible because Plaintiffs admit that their vehicles were fixed for free, thereby giving them the exact bargain to which they claim to be entitled. *See, e.g.*, *Sater v. Chrysler Grp., LLC*, 2016 WL 7377126, at *7-8 (C.D. Cal. Oct. 25, 2016) (granting partial summary judgment to defendant based on lack of benefit-of-bargain damages because alleged defect was fixed by recall remedy).

IV. CONCLUSION

For the reasons outlined herein, Defendant FCA US LLC respectfully requests that this Court dismiss the Consolidated Master Class Action Complaint in its entirety as to all Plaintiffs and all cases.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

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Dated: February 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all attorneys of record who are capable of receiving notice through this system, and I served the foregoing document by first-class mail, postage pre-paid to those that are not.

s/ Larry J. Saylor

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